IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

CASE NO. 77-6333

JAMES W. COOPER, JR. )
Petitioner )
v. ) BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
STATE OF OHIO )
Respondent )

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## SUMMARY OF ARGUMENTS

I. Chief Lake County Sheriff's Deputy Richard Amiott, a witness in the case against petitioner, escorted the jury from the courthouse to the hotel at which it was to be sequestered for the night. The distance involved was approximately 300 meters, and Chief Deputy Amiott had no conversation of any kind with any juror.

Petitoner asks this court to accept this case as a vehicle by which it may forbid any contact between a prosecution witness and the jury under such circumstances. Petitioner thus asks this court to adopt the per se denial-of-due-process rule it rejected in Turner v. Louisiana, 379 U.S. 466 (1965). In Turner, this court held that factors such as the type of custodial relationship the witness experienced with the jury, the degree and length of the associations, and the importance of the witness' testimony at trial were factors to be considered in determining whether a criminal defendant's due process rights are interfered with in a situation presented by petitioner.

On the facts in this case, there is no denial of due process under the rule espoused in Turner. There is no need to adopt any other rule than that set forth in Turner.

II. Petitioner claims his due process rights were interfered with during closing arguments by certain remarks made by the prosecutor.

Initially, it should be noted that petitioner has been unable sub judice to make the clear showing of prejudicial effect required by United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) when the evidence in the case is manifestly against the petitioner-appellant. His claim that he can do so now is thus highly suspect, if unmeritorious.

Secondly, objections were raised at trial to the comments of the prosecutor now claimed to be prejudicial, and those objections were sustained by the trial judge. In the charge, the jury was instructed to disregard anything at trial to which an objection had been sustained. In such situations, this court has held that error, if any, will be deemed to have been cured. Donnelly v. DeChristoforo, 416 U.S. 637 at 644 (1974).

Petitioner also claims prejudice because the prosecution asked the jury to "listen to the defense's side," an allegedly impermissible reference to petitioner's decision not to testify.

But petitoner's claim of prejudice cannot reach the test generally accepted that such comments will not be held to constitute reversible error unless they are manifestly intended or were of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. (See citations in argument.)

In this case, the prosecution was simply commenting on the lengthy and detailed cross examination of the witnesses at trial, as well as the defense's closing arguments. Petitioner was not prejudiced by such statements, and this this case need not be accpeted for review of this allegation of denial of due process.

III. In his third claim herein, petitioner suggests he was prejudiced by a three month delay in the bringing of a second indictment for the same criminal activity. His denial of due process claim must fall in light of United States v. Lovasco, -- U.S. --, 52 L.Ed.2d 752, 97 S.Ct. -- (1977), in that he has failed to show or allege how he was prejudiced by that delay, and further must fail in light of United States v. Marion, 404 U.S. 307 (1971) in that he has failed to show or allege any improper motive on the part of the prosecution.

Petitioner also claims denial of due process in that he was first indicted for murder with the specification of kidnapping (a capital offense), then later indicted for murder with the specification of rape (also a capital crime). He suggests that because of such a sequence of events that he should have been permitted to examine Grand Jury minutes to see what inconsistencies, if any, existed between the presentation of evidence the first time an indictment was requested, and the evidence during the second Grand Jury session on this case. Yet he cannot suggest that the only difference was that scientific testing provided new evidence which allowed the prosecution to seek the indictment with a specification of rape.

In Pittsburg Plate Glass Co. v. United States 360 U.S. 395 (1959), this court adopted the rule that absent a showing of particularized need, a criminal defendant was not entitled due process by denial of a request to review Grand Jury minutes. Such a rule has been adopted in Ohio. Petitioner has failed to make a showing of particularized need, and thus was not denied due process.

IV. In his fourth argument herein, petitioner claims he was denied due process by the refusal of the trial court to provide him an investigator at state expense to interview witnesses.

Petitioner's claim must fall in light of several similar cases. In United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953), the court held that the states are not under any constitutional mandate to provide experts to criminal defendants at state expense.

Further, while the trial court denied petitioner's motion for an investigator to interview witnesses, it did grant an alternative motion for a continuance to allow petitioner's court-appointed lawyers the opportunity to perrofm the same task. The granting of such an alternative motion has been held to preserve the due process rights of criminal defendants. (See citations in argument.)

V. Petitoner claims denial of due process because the trial court refused to consider a motion to suppress evidence which was not timely filed under the Ohio Rules of Criminal Procedure, which requires such motions to be filed within 35 days after arraignment.

This court has recently ruled that a state procedural rule may properly require a motion to suppress to be be made in a timely fashion, and if not so made, may properly refuse to hear the issue. Wainwright v. Sykes, -- U.S. --, 53 L.Ed.2d 594, 97 S.Ct. -- (1977).

The only exception to the above rule is a situation in which petitioner and his counsel would not have known of the existence of the evidence or the manner in which it was procured in time so as to make a timely objection under the rule. Such a situation does not exist in this case.

VI. Petitioner finally asks this court to accept this case to promulgate the rule that a criminal defendant is not only entitled to a speedy trial (guaranteed by the Sixth Amendment, and through the Fourteenth, binding upon the states), but is also entitled to a speedy appeal as well.

Petitioner cites no authority for his contention, and for good reason. No authority exists.

In Barker v. Wingo, 407 U.S. 514 (1972), this court discussed the reasons behind enforcement of the requirement of a speedy trial. But after a criminal defendant is convicted of the charge, all those reasons evaporate.

There is no right to a speedy appeal in the Constitution. Petitioner's claim that such a right exists is without merit.

## I. PETITIONER WAS NOT DENIED DUE PROCESS BY THE MERE FACT THAT A SHERIFF'S DEPUTY WHO TESTIFIED AT TRIAL ESCORTED THE JURY TO THEIR QUARTERS.

The trial court correctly refused to grant a mistrial because Chief Deputy Amiott, a witness in the case, simply escorted the jury to the Holiday Inn where they were sequestered for the night. It is clear that, in the absence of any showing of actual misconduct by Deputy Amiott in relation to members of the jury, it cannot be concluded that his mere presence influenced or intimidated the jury or created prejudicial error.

As noted by the petitioner, Chief Deputy Amiott of the Lake County Sheriff's Department testified as a witness in the State's case in chief. A few days later the case was submitted to the jury for their consideration; the jury requested at 9:50 p.m. to continue deliberation the following day.

The trial court judge ordered that the jurors be escorted from the Court to the Holiday Inn (approximately 300 meters) by the Lake County Sheriff's Department. Chief Deputy Richard Amiott did escort the jury as they walked from the Court House to the Holiday Inn. Chief Deputy Richard Amiott did not have any conversation with any of the jurors. He escorted them to the door of the Holiday Inn where the jurors entered and then were met by the Court's bailiff. Chief Deputy Richard Amiott did not enter the hotel; he

returned to his office. He was with the jury a very brief period of time.

Appellant was given an opportunity by the trial judge to question the court's bailiff in whose custody the court had placed the jury, but appellant did not so inquire. Furthermore, there was no evidence or claim that Deputy Amiott spoke to any members of the jury or in any other way intimidated or influenced the jury.

This problem has been viewed by other courts, and the general rule is that there is not prejudicial error where a deputy sheriff who testifies in a trial is allowed to escort a jury from one place to another. For example, in Roaden v. Commissioners, 473 S.W.2d 814 (Ky. 1971), the court noted that there was no prejudicial error where a deputy sheriff who testified in an obscenity case was allowed to accompany the jury as it proceeded to and from the theater to view the film.

There was no prejudicial error found in State v. Bailey, 352 A. 2d 415 (Del. Sup., 1976), where police officers who testified had a part in guarding the jury during the jury and had the only personal contact with the jury.

A sheriff's escort to avoid outside influence on a jury is very important, for an important prerequisite to a fair and impartial trial it is the requirement that the jury's verdict be based on evidence received in open court and not from outside sources; thus, a sheriff's escort will

avoid outside influence on the jury. Calley v. Calloway, 519 F.2d 184 (Ga. Ct. App., 1975) A trial court judge must not allow public sentiment about the merits of a cause on trial be expressed in the presence of a jury in such a manner as to influence them. People v. Slocum, 125 Cal. Rptr. 442 (Cal. App., 1975). These principles have been furthered rather than hindered in the instant case.

The correct standard in this situation was adopted by this court in Turner v. Louisiana, 379 U.S. 466 (1965), when it decided to reject the per se rule proposed now by petitioner herein, but instead held that factors such as the type of custodial relationship the witness experienced with the jury, the degree and length of their associations, and the importance of the witness testimony during trial would be factors to be considered in deciding whether a defendant's due process rights were interfered with.

Thus, in Turner, this court found reversible error where two key prosecution witnesses, as sheriff's deputies, served as custodians for the jury throughtout the three-day trial. Although there was nothing to indicate that the deputies discussed the case with the jury, they escorted jurors to and from restaurants and their motels, ate with them, conversed with them, and ran errands for them.

None of the above occurrences are present in the instant cause. Chief Deputy Amiott was appointed to assist the bailiff in walking the jurors to their quarters, as opposed to serving as a bailiff himself throughout the

trial. The record reflects that Chief Deputy Amiott accompanied the jury on a single, short occasion as opposed to sharing meals and conversing with the jurors over an extended period of time. At trial, the chief deputy was not a key witness, but merely in his testimony confirmed the testimony of the other officers who did serve as key witnesses.

The rule enunciated in Turner has protected well the rights of both society and criminal defendants for more than a decade and need not be changed now.

## II. PETITIONER WAS NOT DENIED DUE PROCESS BY THE PROSECUTOR'S CLOSING STATEMENT.

In his second argument requesting certiorari, petitioner suggests that he was denied a fair trial and hence due process because of remarks made by the prosecutor during closing arguments. His claim of prejudice has been denied twice before by competent state appeals courts and should not be heard again. Cf. Wainwright v. Sykes, -U.S.-, 53 L.Ed.2d 594, (1977); Stone v. Powell, 428 U.S. 465, 49 L.Ed.2d 1067; 96 S. Ct. 3037 (1976).

In essence, petitioner's request for review is premised upon the motion that prosecutors have too much latitude in commenting upon the evidence during final arguments and that this Court should seize this case as a vehicle to limit that latitude.

Yet the reasons for such latitude are based on strong policy reasons and should not be so easily overturned. See State v. Woodards, 6 Ohio St. 2d 17 (1966).

Further, the decision of two competent state appeals courts was in comformity with the precedents set by this court on the question of prejudice in similar situations.

There is little doubt that the case against the petitioner was a strong one. In such situations, this court has held that a clear showing of prejudicial effect will be required to overturn a conviction. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L.Ed. 1129, 60 S. Ct. 811 (1940), distinguishing Berger v. United States, 295 U.S. 78,

79 L.Ed. 1314, 55 S. Ct. 629 (1935). And in Donnelly v. De Christoforo, 416 U.S. 637, 40 L.Ed.2d 431, 94 S. Ct. 1868 (1974), this court noted (at 416 U.S. 643, 40 L.Ed.2d 437) that "examination of the entire proceedings in this case" was made to determine the extent of any prejudicial effect.

Petitioner has failed to make any such clear showing in this case sub judice. His claim that he can do so now is therefore without merit.

Second, the state appeals courts correctly applied the law as set forth by this court regarding curative instructions. As petitioner notes in this petition, the trial judge sustained counsel's objections to the statements which form the basis for this plea for relief. The trial judge also told the jury the arguments were not evidence and that in any event the jury was not to consider remarks to which an objection was sustained.

This court has consistently held that in such situations, the error, if any, will be deemed to have been cured. Donnelly v. De Christoforo, supra, Singer v. United States 380 U.S. 24, 13 L.Ed.2d 630, 85 S. Ct. 783 (1965); United States v. Socony-Vacuum Oil Co., supra; Holt v. United States, 218 U.S. 245, 54 L.Ed. 1021, 31 S. Ct. 2 (1910).

It cannot be argued that the prosecutor's remarks, even if improper, were so pronounced and so persistent that curative instructions would be deemed to have insufficient effect, Donnelly v. De Christoforo, 416 U.S. at 644, 40

L.Ed.2d at 437, and that the fact situation which gave rise to relief in Berger v. United States, supra, does not exist here.

The state appellate courts have also correctly applied the rule set by this court that where the statements complained of are isolated and only a small part of a lengthy closing argument, that the prejucicial effect will be deemed to be minimal and therefore not so prejudicial as to require reversal. Donnelly v. De Christoforo, supra; United States v. Socony-Vacuum Oil Co., supra. It cannot be argued that the remarks complained of in this case were other than isolated and only a small part of the total closing argument after a lengthy trial.

And finally, this court should apply the narrow standard of review limited to a consideration of due process, and not the broad exercise of supervisory powers this court might exercise in a case originating in a federal court. Donnelly v. De Christoforo, supra. In applying that standard, it must be held, on the facts, that petitioner was not denied the fundamental fairness essential to the very concept of justice.

Petitioner also complains that he was denied due process because the prosecutor asked the jury to "listen to the defense's side," and thereby impermissibly commented on the petitioner's decision not to testify or to offer evidence. In that regard, the analysis of the Ohio Supreme Court Sub

judice can hardly be improved upon, viz:

> A helpful test in determining whether the above comment improperly indicated that the defendant failed to testify on his own behalf at trial is to determine "* * * whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Knowles v. United States (C. A. 10, 1955), 224 F.2d 168, 170.
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> In the above statement, it is reasonable to conclude that the prosecution, in requesting the jury to "* * * listen also to the defense's side * * *" was not in any way pointing to the failure of the defense to present evidence, but was simply requesting the jury to compare what the defense had to say about the conclusions that could be drawn from the evidence with what the prosecution already proposed. (See, e. g., Clarke v. United States (D. C. App. 1969), 256 A. 2d 782; McCracken v. State (Alaska 1967, 431 P. 2d 513.) Thus, appellant's argument is without merit.

Petitioner has failed to show how his case presents novel or unusual circumstances not governed by prior decisions, and has failed to show exigencies which would require the formulation of a new rule. His petition, therefore, should be denied.

## III. A CRIMINAL DEFENDANT IS NOT ENTITLED TO VIEW GRAND JURY MINUTES WITHOUT SHOWING A PARTICULARIZED NEED.

Petitioner has asked this court to take his case as a vehicle to "explode the secrecy of the Grand Jury proceedings." He also alleges impermissible pre-indictment delay prior to the bringing of the second indictment in this case.

Turning first to the latter claim, it should be noted that petitioner alleges no prejudice, only delay. Nor does he allege that delay was an intentional device to gain advantage over the accused.

Petitioner alleges that he was denied due process because three months elapsed between the time he was arrested and the time additional charges were brought, but he fails to show how he was prejudiced by that delay, and under the formulation expressed by this court in United States v. Lovasco, -U.S.-, 52 L.Ed.2d 752, 97 S. Ct. -(1977), his petition must fail for that reason. Petitioner also fails to allege that the pre-indictment delay was the result of improper prosecutoral purpose, and under United States v. Marion, 404 U.S. 307, 30 L.Ed.2d 468, 92 S. Ct. 455 (1971) which requires such purpose, his petition must also fail.

Petitioner alleges denial of due process because he was first indicted for aggravated murder committed during a kidnapping or attempted kidnapping (a capital crime), then later indicted for aggravated murder with a similar specification

of rape (another capital crime). He suggests various sinister motives, inconsistencies, and cloak-and-daggerism in this sequence of indictments.

Yet the murky waters described by petitioner are quickly cleared by the facts: after the original indictment was issued, results of scientific tests gave the prosecution the requisite proof to bring the second charge of murder with the specification of rape.

Petitioner cannot suggest that prosecutors are under a burden to indict him "as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." S h was explicitly rejected in Lovasco, 52 L.Ed.2d at 760). He cannot-and has not-suggested a particularized need. He can only suggest murkiness which does not exist.

This court, in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959) established the rule that absent a particularized need a criminal defendant may not inspect the Grand Jury minutes. While that rule has been liberalized by some courts, Cf. United States v. Youngblood, 379 F.2d 365 (1967), the State of Ohio has chosen not to do so, State v. Morris, 42 Ohio St. 2d 307, cert.den. 423 U.S. 1049 (1975); State v. Lasky 21 Ohio St. 2d 187 at 191 (1970) Since the decision of the State of Ohio not to permit inspection is not a denial of due process under Pittsburgh Plate Glass, supra, this court need not concern itself with this aspect of the case unless it is ready to overrule the sound logic

behind that decision and make the Grand Jury proceedings just another vehicle for pretrial discovery. The petition should be denied.

IV. WHERE A DEFENDANT IS GRANTED A CONTINUANCE TO ENABLE HIS TWO COURT-APPOINTED ATTORNEYS ADDITIONAL TIME TO PREPARE HIS DEFENSE, IT IS NOT DENIAL OF DUE PROCESS FOR THE COURT TO DENY DEFENDANT'S MOTION FOR AN INVESTIGATOR AT STATE EXPENSE.

The trial court sub judice granted petitioner additional time to prepare his case, and therefore did not deny him due process when it overruled his Motion to Hire an Investigator at state expense.

A review of the time sequences is necessary to show that petitioner's claim is without merit. On February 22, 1974, James W. Cooper, Jr., was arrested; on June 3, 1974, he filed a Motion to Hire an Investigator, at this time the trial date was set for June 10, 1974; on June 5, 1974, the appellant filed a Motion to Continue and a renewal of the Motion to Hire an Investigator, the Motion to Continue was to July 1, 1974; on June 17, 1974, the appellant's Motion to Hire an Investigator was overruled; on July 1, 1974, the trial commenced; and on July 18, 1974 the jury rendered its verdict.

Petitioner's Motion to Hire an Investigator was predicated upon the fact that it was impossible to interview all of the witnesses and prepare a defense by the trial date set for June 10,1974. However, on June 5, 1974, which was the date that the Motion to Hire an Investigator was filed, the defendant-appellant also filed a Motion for Continuance, which was granted on June 17, 1974, the same date that the

Motion requesting an investigator was overruled. By granting the continuance, the trial court afforded petitioner a reasonable alternative to hiring an investigator. In Britt v. North Carolina, 404 U.S. 226, 30 L.Ed.2d 400 (1971), the court distinguished Griffin v. United States, 351 U.S. 12, cited by petitioner, and held that a defendant is not deprived of equal protection where a specific request of the defendant was denied but alternative devices that fulfilled the same function were available. By the trial court granting the continuance the court afforded petitioner an alternative which enabled him to have the basic tools for an adequate defense. Therefore, there was no need for an investigator.

By the overwhelming weight of authority the rule is firmly established that an indigent accused has no constitutional right to the appointment of a private investigator at state expense. See, Annotation, 34 A.L.R. 3d 1256, 1272, and cases cited therein.

This Court has not directly addressed the issue whether the due process clause requires the appointment of an investigator at state expense. However, a negative answer to the question is clearly indicated by the holding of the Court in United States ex rel. Smith v. Baldi, 344 U.S. 561, 97 L.Ed. 549 (1953), that the states are not under any constitutional mandate to provide experts to indigent defendants free of charge.

Many states have provided by statute for the appointment of an investigator for an indigent accused at

the expense of the state, ususally placing the issue within the sound discretion of the trial court. See Annotation, 34 A.L.R. 3d 1256, supra. Ohio law does not establish such a statutory right. In the absence of a statutory scheme providing for the appointment of investigators, it is generally held that there is no right to a free investigator. State v. Thomas, 452 P.2d 512 (Supreme Court of Arizona, 1969); Watson v. People, 394 P.2d 737 (Supreme Court of Colorado, 1964). See also, Watson v. Patterson, 358 F.2d 297 (10th Cir., 1966), wherein the Federal Court of Appeals agreed with the Colorado Supreme Court.

The facts of this case are similar to the matter before the court in State v. Dillon, 471 P.2d 553 (Idaho, 1970) wherein the Supreme Court of Idaho held that it was not error for a trial judge to refuse to appoint an investigator for an indigent defendant when the motion was supported only by the conclusory statement that the number of witnesses precluded effective preparation of the defense. The Court pointed out that even though such an investigator is authorized by law where "necessary", such was not the case where the defendant's two attorneys had sufficient time to prepare their case and interview the necessary witnesses. See also as requiring a showing of necessity, where authorized by law, State v. Frazier, 514 P.2d 302 (N.M. 1973); and Ruff v. State, 223 N.W. 2d 446, (Supreme Court of Wisconsin, 1974). See also Watson v. State, 219 N.W. 2d 298, (Supreme Court of Wisconsin, 1974), wherein the court, in upholding a

trial court's refusal to authorize the hiring of an investigator for an indigent defendant explained that defense counsel is presumed to have some investigatory expertise. The Wisconsin Supreme Court held that a trial court may grant the defendant a free investigator if the court determines in its discretion that a fair trial cannot be had without one. 219 N.W. 2d at 405.

This Court recognized in Griffin, supra, that in reality, a defendant is effectively precluded from appealing his case if he must pay for the transcript of his trial. The rule in Griffin is based upon necessity. The petitioner in this case had two experienced attorneys representing him at the expense of the state. The court's action in giving them additional time to conduct the necessary interviewing of witnesses, at state expense, was a reasonable alternative to granting the motion to hire an investigator.

However, more important than the Britt rule noted above, it must be noted that on the same date that the trial court overruled petitioner's Motion to Hire an Investigator, the court did grant the petitioner's Motion to Hire an EXPERT. No type of expert was specified by petitioner's Motion nor by the court. Consequently, petitioner could have hired a criminologist or an investigator as his EXPERT. Petitioner did not hire anyone.

The trial court has discretion on whether to allow an indigent to hire private investigators at State's expense. In this present case the court did not grant the specific

Motion to Hire an Investigator. However, the court did grant to petitioner an opportunity to hire any EXPERT of his choice. Petitioner failed to take advantage of this opportunity. If one looks at the total circumstances concerning all of petitioner's motions, it is unreasonable and illogical to conclude that by not granting petitioner's Motion to Hire an an Investigator at the State's expense that the trial court denied due process.

V. PETITIONER WAS NOT DENIED DUE PROCESS BY REFUSAL OF THE COURT TO CONSIDER A MOTION TO SUPPRESS WHICH WAS NOT TIMELY FILED.

Petitioner suggests that he was denied various federal rights because the trial court refused to consider a motion to suppress evidence which was filed well after the time set by rule for such motions.

The essence of petitioner's claim is that he was not provided, via discovery, the significance of the evidence to which he wanted to object until after the 35-day limit set by rule, and that therefore the rule should not have been used to preclude review of the validity of the seisure of such evidence.

The essence of the State of Ohio's reply to petitioner's claim is contained in the holding of the Ohio Supreme Court:

> Where defendant and his counsel know of circumstances under which certain evidence was obtained in ample time to prepare and file (a) pretrial motion to suppress such evidence, but did not do so, assignments of error concerning overruling of the trial court on motion to suppress such evidence would not be considered.
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> State v. Carter, 21 Ohio St. 2d 212 (1970).
> State v. Davis, 1 Ohio St. 2d 28, (1964).

The chronology of events is dispositive of the question.

On February 18, 1974, petitioner's automobile was searched pursuant to a duly executed search warrant, and several items were seized. A copy of the warrant was served on petitioner and a return of the warrant filed with the

Clerk of Courts the next day. On February 17 and 18, petitioner made statements to law enforcement officials. Petitioner was indicted on a charge of aggravated murder with the specification of kidnapping (a capital offense) on February 22, 1974, and was arraigned on February 25.

But it was not until May 31, 1974--long after the 35-day limit had expired--that petitioner filed a motion to suppress the evidence seized on February 18 because of the alleged insufficiency of probable cause for the issuance of the search warrant. The same day, petitioner filed a motion to suppress the statements made on February 17 and 18, alleging they were not voluntarily given.

There can be no doubt that while a criminal defendant has a right to a hearing on the admissability of evidence if requested, Jackson v. Denno, 378 U.S. 368, 12 L.Ed.2d 908, 84 S. Ct. 1774 (1964), that a state procedural rule may properly require such request to be made in a timely fashion and if not so made, may properly refuse to hear the issue, Wainwright v. Sykes,-U.S.-, 53 L.Ed.2d 594, 97 S. Ct.-(1977).

Petitioner knew that he had made statements and the content of the statements to law enforcement officers long before the expiration of the 35-day limit set by rule. He also knew of the search of his automobile and what items were seized and received a copy of the search warrant and it supporting affidavit long before the expiration of the 35 days.

Petitioner knew very shortly after his arrest he would be on trial for his life. He knew the prosecutoral and police agencies involved would have to prove their case through circumstantial evidence, by piecing together a shred of evidence here, another shred there. His lawyers were neither inexperienced nor naive about the manner in which the state's case would be assembled. Yet they did not, with all this knowledge, challenge the validity of the procurement of the evidence, even though such evidence had the potentiality of being crucial.

Petitioner's claim is that he had no knowledge of the significance of the items seized and the statements made until after the 35-day period. But petitioner confuses the questions of the significance of the evidence itself at trial and the manner in which that evidence was procured.

Improperly seized evidence is suppressed not because it is significant, but rather because the Fourth Amendment was violated. Petitioner had an opportunity to establish that violation and failed to do so. He cannot now claim denial of due process for his failure to make a contemporaneous objection.

VI. A DEFENDANT IN A CRIMINAL CASE IS NOT DEPRIVED OF DUE PROCESS OF LAW OR EQUAL PROTECTION OF THE LAW BY A DELAY IN PREPARATION OF THE TRANSCRIPT FOR HIS APPEAL FROM A CONVICTION.

Petitioner was not denied a right to a speedy trial by reason of delay on his appeal to the Court of Appeals from his conviction of aggravated murder.

Petitioner claims that he was deprived of a speedy appeal because the court reporter failed to prepare the transcript of proceedings for almost twenty months after the notice of appeal from his conviction was filed. Petitioner argues this court shoud extend the 6th Amendment right to a speedy trial applicable to the states through the 14th Amendment to create a new right to a "speedy appeal."

Article 1, Section 10 of the Ohio Constitution and the 6th Amendment of the United States Constitution guarantees a defendant in a criminal trial a speedy trial but has never been construed to guarantee a convicted defendant a speedy appeal. Petitioner offers no authority indicating that a right to a speedy appeal exists. And there is none. An analysis of the foundation of the right to a speedy trial demonstrates that a similar right to a speedy appeal does not exist since the rights that the guarantee of a speedy trial was designed to protect are not present after an individual has been convicted of a crime.

The principles of the speedy trial concept were explained by this court in Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101 (1972), wherein the court noted that prejudice

to the defendant by denial of a speedy trial should be assessed in the light of interests of the defendants which the right to a speedy trial was designed to protect. The court identified three such interests: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired.

Applying the Barker v. Wingo concept to the present case, it should be noted that the appellant is not being subjected to pretrial incarceration. The appellant has had his day in court and has been found guilty by a jury of aggravated murder. The presumption of innocence has evaporated. There is nothing oppressive in incarcerating a convicted felon pending his appeal. The presumption of innocence at the trial level does not exist at the appeal level. On the contrary, there is a presumption of the regularity of the proceedings at the trial level. The appellant has the burden of overcoming such presumption on appeal.

Of course, an appellant has the opportunity to seek a stay of execution pending resolution of his appeal. Where a trial judge rules that an appellant should not be released during the pendency of his appeal, a "speedy appeal" argument is not the proper way to challenge such a ruling.

The anxiety and concern which the court in Barker v. Wingo identified as prejudicial is that which inherently accompanies an outstanding public accusation which has not yet been proven. The anxiety and concern over the possible loss of jobs, disruption of family life, and other effects can have a devastating impact upon a person supposedly

"presumed innocent". The court is correct in seeking to minimize such anxieties and concerns prior to the trial, and until the defendant is proven guilty. However, once the defendant has been tried and convicted, the presumption of innocence disappears, and these concerns dissipate.

There is much less possibility of an impairment of a defense in an appeal situation. Petitioner makes no claim that the presentation of his arguments on appeal was in any way affected by the delay. In a trial situation speed is much more crucial because delay may result in the absence of witnesses from the jurisdiction, death of a witness, or loss of memory which might affect a defendant's ability to prepare a defense. In an appellate situation, all arguments must be predicated upon facts in the record. The record is quite obviously not subject to the above contingencies. Therefore, delay will not impair the defendant's ability to effectively pursue his appeal.

In United States v. Cifarelli, 401 F.2d 512 (2nd Cir., 1968) cert. den. 393 U.S. 987, the court specifically held that the appellant was not denied his constitutional right to a speedy trial because of a lengthy delay on appeal. The delay included a period of one whole year during which the appellant was without a court-appointed attorney. The court, in denying appellant's speedy trial claim, stated

> The delay was unfortunate, but the constitutional guarantee to a speedy trial upon which appellant relies cannot easily be transposed to an appeal. . . The purpose of the guarantee is to prevent long unjustified incarceration or anxiety prior to trial and to limit the possibility that the memory of witnesses may dim or evidence may be lost, thus impairing the ability of the accused to defend himself. 401 F. 2d at 514.

See also, United States v. Massimo, 432 F. 2d 325 (2nd Cir., 1970); cert. den., 400 U.S. 1022, wherein the Court held that a delay of twelve and one-half months from the filing of the notice of appeal to the date of oral argument did not violate due process.

It stands to reason, also, that delay on an appeal can only prejudice a defendant if his conviction is reversed. Thus, it would also appear that the proper time to assert the right is on retrial. Of course, the same general rules regarding the speedy trial right then apply. See United States v. Sarvis, 523 F.2d 1177 (C.A., D.C.,1975).

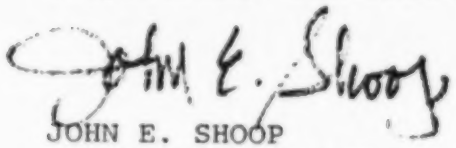
There is no right to a speedy appeal in either the Fifth, Sixth, or Fourteenth Amendments to the Constitution. Petitioner's appeal to this court to create such a right should be rejected.

## CONCLUSION

Petitioner was not denied due process of law in the proceedings sub judice. His allegations of denial of constitutional rights were rejected below in accordance with the applicable law as heretofore determined by this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,



JOHN E. SHOOP
PROSECUTING ATTORNEY

CERTIFICATE OF SERVICE

Three copies of the foregoing Brief in Opposition to Certioriari was served on Leo J. Talikka, Esquire, and Joseph R. Ulrich, Counsel for Petitioner, by delivering to their offices at One New Market Place, Suite H-301, Painesville, Ohio, 44077, all in accordance with Rule 33 (1).

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